STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Neff, P.J., and Wilder and Cooper, J.J.

CENTRAL CEILING & PARTITION, INC.,

Plaintiff-Appellee

v

STATE OF MICHIGAN DEPARTMENT OF COMMERCE HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND,

Defendant-Appellant

and

KITCHEN SUPPLIERS, INC.

Defendant, Cross and Counter Plaintiff-Appellee

and

CAPPY HEATING AND AIR CONDITIONING, INC.,

Intervener, Cross-Claimant, Counter-Claimant and Third Party Plaintiff-Appellee.

_____ /

Supreme Court No.121009

Court of Appeals No. 225378

Wayne County Circuit Court
No. 98-810597-CH

BRIEF ON APPEAL - APPELLANT
ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

I. **MCL 570.1302(1) provides that the Construction Lien Act is to be liberally construed and that substantial compliance is sufficient for the validity of construction liens. In *Northern Concrete Pipe, Inc. v Sinacola Companies-Midwest, Inc.*, 461 Mich 316; 603 NW2d 257 (1999), this Court held that provision does not apply to the clear and unambiguous provisions of the Act in general and does not apply to the 90-day recording provision of MCL 570.1111(1) in particular. Is "substantial compliance" an appropriate concept to apply to the recording of construction liens?**

II. **MCL 570.1111(1) provides in pertinent part as follows:**

> **" ...the right of a ...subcontractor, ..., or supplier to ... a lien ... shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material...a claim of lien is recorded in the office of the register of deeds..."**

The liens in this case were recorded 4 to 6 weeks after the 90 days. Did those liens cease to exist when they were not recorded within 90 days of the last furnishing of labor or material?

III. **The claims of lien were presented and accepted for filing within 90 days of last furnishing. Given the nature of the interests designed to be protected by a recording requirement, does it matter that, aside from inquiring as to the lag time at the register of deeds office and filing the liens earlier, the lien claimants did all they could have done to insure timely recording of their interests?**

STATEMENT OF PROCEEDINGS AND FACTS

A. Statutory Background and Fund Overview

The matter before the Court concerns certain interests in real property that are implicated and served by the recording provisions of the Construction Lien Act (Act), MCL 570.1101, *et seq.* The Act is divided into three parts. Part 1 contains definitions and sets forth the criteria for establishing and enforcing a construction lien through a foreclosure action. Part 2 creates the Homeowner Construction Lien Recovery Fund (Fund) and establishes the requirements necessary to establish Fund liability as an alternative to foreclosure where the specified conditions are met. Part 3 contains administrative provisions and includes a section on statutory construction of those parts of the Act that are subject to construction.

The Act, at Section 302(1), provides that it should be liberally construed:

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them. [MCL 570.1302(1).]

In *Northern Concrete Pipe, Inc. v Sinacola Companies-Midwest, Inc.*, 461 Mich 316, 321 n 15; 603 NW2d 257 (1999), this Court commented on the application of Section 302(1):

> In *Brown Plumbing* [*Brown Plumbing & Heating v Homeowner Construction Lien Recovery Fund*, 442 Mich 179; 500 NW2d 733 (1993)], in the course of explaining that the "substantial compliance" provision of MCL 570.1302(1); MSA 26.316(302)(1) is inapplicable to part two of the act, this Court stated that the provision does apply to part one. Subsequently, in *Vugterveen Systems* [*Vugterveen Systems, Inc. v Olde Millponde Corp.*, 454 Mich 119; 560 NW2d 43 (1997)], n 10 supra, this Court stated that "substantial compliance is sufficient to meet the provisions in part one of the act." 454 Mich 121, citing *Brown Plumbing*, 442 Mich 183. However, the Court in *Vugterveen Systems* did not specifically examine whether the "substantial compliance provision is applicable to every word of every provision within part one of the act.
> [Quotation marks in original.]

Northern Concrete Pipe thus makes it clear that the substantial compliance provision, MCL 570.1302(1), is not applicable to all words in all sections of the act, particularly where a "precise deadline" is concerned or where simply no construction is needed because the language is clear and unambiguous. *Id.* at 320, 323.

The Fund is composed of members who are either required to join the Fund as a condition of licensure (e.g., residential builders) or who voluntarily join in order to avail themselves of the benefits of Fund membership (e.g., suppliers). A subcontractor, supplier, or laborer who seeks foreclosure of a construction lien on a residential structure and who seeks to obtain alternative recovery from the Fund is required to name the Fund as a defendant pursuant to MCL 570.1203(4).

Once it has been determined that certain prerequisites have been met by the homeowner under section 203(1), the Act provides that a "...claim of construction lien shall not attach to a residential structure...." MCL 570.1203(1). Thus, since the lien claimant's lien cannot attach to a homeowner's property, the Fund is the entity to which a lien claimant must look for recovery. At that point, however, there are other requirements under MCL 570.1203(3) a lien claimant must meet in order to be eligible to obtain recovery from the Fund. In addition to those requirements, the Fund is entitled to assert any defenses that would be available to the homeowner pursuant to MCL 570.1203(5), including, but not limited to, the defense available under MCL 570.1111(1), the provision at issue here.

B. Facts of the Record

Homeowners, Harihar Kulkarni (Kulkarni), Robert and Shelley Rebecca (Rebeccas) and William and Tammy Perry (Perrys) each contracted with a licensed residential builder, Primeau Homes, Inc. (Primeau) to provide an improvement to their properties. [Appendix (App) 9a and 10a.] Primeau and Michael Garavaglia (Treasurer of Primeau) contracted with subcontractors

and suppliers Central Ceiling & Partition, Inc. (Central), Kitchen Suppliers, Inc. (KSI), and Cappy Heating and Air Conditioning, Inc. (Cappy) to provide materials and labor to the respective homeowners' properties. (App 10a.) Primeau did not pay Central, KSI, and Cappy for their services. (App 11a.) As a result, Central, KSI, and Cappy recorded liens on the Kulkarni's, Rebeccas', and Perrys' property and initiated construction lien foreclosure actions against their properties. Since Central, KSI, and Cappy are Fund members and the properties were residential structures, the lien claimants sought recovery from the Fund pursuant to the Act. (App 11a-13a.)

Central, KSI, and Cappy each presented their liens to the Wayne County Register of Deeds within 90 days of last furnishing their materials and labor. However, their liens were not recorded (i.e., assigned a liber and a page number noting the date, hour and minute of entry into the books) until 47, 34, and 49 days latter, respectively. (App 11a-13a and 27a.) The undisputed relevant dates are as follows:

Central's liens

(Perry property)	
Last date of furnishing	10/3/97
Presented to Register of Deeds	12/17/97
Claim of lien recorded	2/2/98
(Kulkarni property)	
Last date of furnishing	10/3/97
Presented to Register of Deeds	12/17/97
Claim of lien recorded	2/2/98

(Rebecca property)

Last date of furnishing	10/3/97
Presented to Register of Deeds	12/17/97
Claim of lien recorded	2/2/98

KSI's lien

(Perry property)

Last date of furnishing	6/11/97
Presented to Register of Deeds	8/27/97
Claim of lien recorded	9/30/97

Cappy's liens

(Perry property)

Last date of furnishing	9/18/97
Presented to Register of Deeds	12/5/97
Claim of lien recorded	1/23/98

(Rebecca property)

Last date of furnishing	9/18/97
Presented to Register of Deeds	12/5/97
Claim of lien recorded	1/23/98

(App 10a-13a and 18a-26a.)

C. Court Proceedings

In the trial court, the Fund brought a motion for summary disposition on the grounds that Central's, KSI's, and Cappy's rights to foreclose on their liens either against the property, or, in the alternative, to recover from the Fund, ceased to exist because their liens were not recorded within 90 days of their last date of furnishing as required by MCL 570.1111(1). (App 1a and 53a.) The trial court denied the Fund's motion, finding that the lien claimants had substantially complied with the Act. (App 48a and 67a.) In lieu of proceeding with a bench trial, a Findings of Fact and Opinion together with a Judgment were entered by the trial court. (App 7a and 28a.) On January 26, 2000, the final Judgment dismissed the respective homeowners [since they complied with MCL 570.1203(1)] and awarded the lien claimants $32,249.00 against the Fund

[$21,280.00 in favor of Central; $4,054.00 in favor of KSI; and $6,915.00 in favor of Cappy]. (App 30a.)

On December 22, 1999, this Court issued its decision in *Northern Concrete Pipe, supra,* and immediately after entry of the final Judgment, the Fund filed a Motion for a New Trial and a Motion for Relief from the Judgment based upon the *Northern Concrete Pipe* decision. (App 1a and 68a.) The trial court denied the Fund's motion. (App 52a and 69a.)

On February 16, 2000, the Fund filed a Claim of Appeal with the Court of Appeals. (App 2a.) On June 30, 2000, the Fund filed a Motion for Peremptory Reversal and Brief on Appeal and in Support of Motion for Peremptory Reversal. (App 3a and 4a.) On September 28, 2000, the Court of Appeals denied the Fund's Motion for Peremptory Reversal. (App 5a.) On November 5, 2001, Oral Argument was held followed by the Court of Appeals rendering a published opinion on January 29, 2002. (App 5a and 36a-40a.) The majority, by a vote of 2-1, affirmed the decision of the trial court and held that the "filing within the ninety-day statutory period, and the acceptance of a lien claim by the register of deeds, substantially complies with the [A]ct's requirement of recording the lien claim." (App 39a.) The dissent stated that the judgment in favor of the lien claimants should be reversed as the majority's opinion conflicts with "the plain meaning of the of the term 'recorded' as used in the [A]ct." (App 44a.)

On February 15, 2002, the Fund filed an application for leave to appeal to this Court for the reason that the decision of the Court of Appeals is clearly erroneous as it is contrary to the plain meaning of the Act that "the right to a construction lien ceases to exist" unless the lien is recorded within 90 days of the last date of furnishing pursuant to MCL 570.1111(1). The decision is in direct conflict with this Court's ruling in *Northern Concrete Pipe, supra*, 461 Mich at 323, 324, which held that the substantial compliance provision of the Act, MCL 570.1302(1), does not apply to the clear and unambiguous 90-day recording provision provided for in MCL

570.1111(1). The Court of Appeals decision impacts the jurisprudence of the State in that its decision extends beyond the parties to this litigation to property owners, bona fide purchasers, and other third parties who will be faced with uncertainty as to who is claiming a particular interest in either a commercial or residential property.

On March 26, 2003, this Court granted the Fund's application for leave to appeal from the Court of Appeals' decision. (App 70a.) The Court requested that the parties address, among other issues, "whether MCL 570.1111 can be satisfied by *substantial compliance*, and, if so, whether the plaintiffs substantially complied with the statute in this case." (App 70a.)

ARGUMENT

I. MCL 570.1111(1) cannot be satisfied by substantial compliance.

A. Standard of Review

This case involves the interpretation of the provisions of the Construction Lien Act, MCL 570.1101, *et seq*. The interpretation of a statute is a question of law, which is reviewed de novo. *Vugterveen Systems, Inc. v Olde Millpond Corp.*, 454 Mich 119; 560 NW2d 43 (1997).

B. The Court of Appeals' decision disregards the plain meaning of the clear and unambiguous language provided for in MCL 570.1111(1).

The Fund agrees with Central, KSI, and Cappy that it is the register of deeds' duty to record. However, neither the Fund, the homeowners (in whose shoes the Fund stands), nor innocent interested persons without notice are in any better position to bear the burden of the register of deeds' failure to perform its ministerial duties.

Despite this, the main reason why the decision of the Court of Appeals should be reversed is to be found in the dissenting opinion, i.e., the clear and unambiguous language in MCL 570.1111(1) should be applied as written. *Sun Valley Foods Company v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Rather than give effect to the plain meaning of the word "recorded" in MCL 570.1111(1), the Court of Appeals' decision suggests that the Legislature intended that "filing" and "acceptance" by the register of deeds be the mechanism by which lien rights are created and preserved pursuant to MCL 570.1111(1). Yet, part 1 of the Act unequivocally provides that the right to a construction lien, which is not recorded by the register of deeds within 90 days of the last date of furnishing materials and labor, "cease[s] to exist."

> Notwithstanding section 109, **the right** of a contractor, subcontractor, laborer, or supplier **to a construction lien** created by this act **shall cease to exist unless, within 90 days** after the lien claimant's last furnishing of labor or material for the improvements, pursuant to the lien claimant's contract**, a claim of lien is recorded in the office of the register of deeds** for each county where the real property to which the improvement was made is located.
> [MCL 570.1111(1). (Emphasis added).]

It is a cardinal rule of statutory construction that language that is plain and unambiguous is not subject to construction and warrants none. *Sun Valley, supra,* at 236. Even though the Act contains a substantial compliance provision[1], which allows for a liberal construction to apply to part 1 of the Act, this Court in *Brown Plumbing, supra,* 442 Mich at 185, stated that liberal construction applies only when an ambiguity exists.

> While we acknowledge that the liberal construction of the first sentence [of section 302] applies to the entire act, we nonetheless find that **liberality cannot and should not nullify a clear and unambiguous requirement**.
> [Emphasis added.]

Thus, while the Act is remedial in nature, this Court observed in *Northern Concrete Pipe, supra,* that the Legislature's use of the term "substantial compliance" in the instant Act should not "be interpreted to nullify altogether the general rule that statutes should be interpreted consistent with their plain and unambiguous meaning." *Northern Concrete Pipe* at 321.

There is no ambiguity with respect to the language provided for in MCL 570.1111(1). Contrary to the Court of Appeals' ruling that "it [MCL 570.1111(1)] was tacitly understood to require that a claimant file the lien with the register of deeds," (App 40a.) there is no indication

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[1] MCL 570.1302 (1):

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

in either the Act or other recording statutes in general (e.g., MCL 565.25) that the mere filing of a lien or acceptance by the register of deeds would permit enforcement of a lien right. Rather, MCL 570.1111(1) extinguishes the right to a construction lien declaring that it "***shall cease*** to exist, ***unless recorded*** within 90 days...." (Emphasis added). It is apparent from the plain meaning of the language above that recording is the necessary prerequisite to the right to a construction lien, not filing and acceptance. That is precisely the holding of this Court in *Northern Concrete Pipe, supra*, where the lien was twice timely presented for acceptance but sent back.

The first criterion in determining the intent of the Legislature is to look at the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). In this case, the word "record" is not defined in the Act. Therefore, the plain and ordinary meaning of "record" applies, taking into account the context in which the word is used. *Phillips v Jordan*, 241 Mich App 17, 22-23, n 1 (citing MCL 8.3a); 614 NW 2d 183 (2000) and *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997).

To determine the meaning of "record" it is appropriate to consult dictionary definitions. *Phillips, supra,* citing *Popma v Auto Club Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994); *Ryant v Cleveland Twp*, 239 Mich App 430; 608 NW2d 101 (2000). Dictionary definitions of the word "record" include the following:

> **1** *a)* to put in writing, print, etc. for future use;... *b)* to make a permanent or official note of **2** *a)* to indicate automatically and permanently...**4** *a)* to register in some permanent form,...[Webster's New World Dictionary, (3rd ed. 1986).]

Blacks Law Dictionary (6th ed. 1990) defines the term "record" as "[t]o transcribe a document, or entry of the history of an act or series of acts, in an official volume, for the purpose of giving notice of the same... ." Given the dictionary definitions of "record," and the context of the Act in

which the word "record" appears, it is clear that the mere filing and acceptance of a claim of lien by the register of deeds does not constitute recording. This is consistent with the policy underlying recording statutes, which is to provide notice. Various instruments, including liens on real property, are left with the register of deeds for the purpose of being recorded into the appropriate books so interested third parties may find them. The recording of a lien on real property does not occur until an entry has been made with the assignment of a liber and page number noting the date, hour and minute the lien is entered. Thus, prior to the recording of an instrument, notice is not effectuated to third parties.

The opinion of the Court of Appeals points to cases (not statutes), which use the term "file the lien with the register of deeds" in support of its position that it is "tacitly understood" that filing is recording. Other jurisdictions have held that while the words "file" and "record" are sometimes used interchangeably, the two words require different things. *State v Noren*, 621 P2d 1224, 1125 (Utah 1980).

> "Recorded" has been held to signify "copied in some book" while "filing" signifies merely delivery to the proper official.
> [citing *Beatty v Hughes*, 61 Cal App 2d 489, 492; 143 P2d 110 (1943) and *Maryland Department of Natural Resources v Hirsch*, 42 Md App 457; 401 A2d 491 (1979).]

Filing a claim of lien with the register of deeds' office is not the same as recording a claim of lien. *Northern Concrete Pipe, supra.* After a lien is delivered to the register of deeds, the recording of a lien entails actually copying it into a book otherwise known as a liber.

There are other statutes that provide guidance as to the Legislature's intent in the context in which the recording scheme is considered. For example, MCL 565.25 pertaining to entry books for the recording of instruments such as deeds, mortgages, levies, attachments, and liens provides that an instrument shall be recorded at the time so noted and shall be notice to all persons.

> (4) The instrument **shall be deemed recorded** at the time so noted and **shall be notice to all persons** except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.
> [MCL 565.25(4). (Emphasis added).]

Even the sample notice of furnishing form provided in the Construction Lien Act, contains the word "record."

> (4) The notice of furnishing, if not given on the form attached to the notice of commencement, shall be in substantially the following form:
>
> ***
>
> in connection with the improvements to the real property described in the notice of commencement **recorded in liber**....., **on page**.....
> [MCL 570.1109(4). (Emphasis added).]

It is apparent from the above statutory provisions that an instrument such as a claim of lien is ultimately recorded after it is filed and accepted by the register of deeds. Where MCL 565.25(4) states that an instrument is deemed "recorded at the time so noted", the language must mean that recordation is fulfilled upon entry into the books (i.e., the time at which the instrument is assigned a liber and page number noting the date, hour and minute it was entered into the books). In fact, in *Balen v Mercier*, 75 Mich 42, 48; 42 NW 666 (1889), it was held that an instrument must be entered into the books to be recorded. Any other construction would defeat the purpose of recording by failing to provide effective notice to all persons. MCL 565.25(4).

Nor does acceptance of a claim of lien by the register of deeds imply recording. Rather, acceptance of a lien by the register of deeds entails determining that the lien is in proper recordable form, that it contains the required signatures and that the appropriate fee is paid. Recording on the other hand, entails the actual copying or recording of the lien into the books. Just as filing and recording are two separate actions, acceptance and recording are two separate

actions, even though it could be a contemporaneous process. Thus, the words "acceptance" and "recording" are not synonymous.

In the instant case, it is undisputed that Central's, KSI's, and Cappy's liens were not recorded (i.e., assigned a liber and a page number noting the date, hour and minute of entry into the books) within 90 days of their last date of furnishing. (App 10a-13a and 18a-26a.) If the Legislature had intended for filing and acceptance to be the means by which a right to a construction lien is created, it would have used the terms "file" and "acceptance" in the 90-day recording provision of the Act. But in this case the Legislature has decided that lien rights are created by recording a claim of lien with the register of deeds. It does not matter that there may be another statutory scheme, which may be fairer, because the Legislature in this case has already provided clear and unambiguous requirements for creating lien rights. Any changes with respect to the requirements set forth in MCL 570.1111(1) must be addressed by the Legislature, not the judiciary. *People v McIntire,* 461 Mich 147, 159; 599 NW2d 102 (1999). The plain meaning of the word "record" must be applied as written regardless of the particular circumstances to ensure the express intent of the Legislature and the purpose behind recording, which is to provide notice. Therefore, since Central's, KSI's, and Cappy's claims of lien were not recorded (i.e., assigned a liber and a page number noting the date, hour and minute of entry into the books) within 90 days as mandated by MCL 570.1111(1), their right to a claim of lien "cease[d] to exist".

C. **To permit the substantial compliance provision to apply to MCL 570.1111(1) would seriously damage the carefully crafted balance the 90-day recording period provides to lien claimants and others who have or may have an interest in a particular property.**

The fundamental purpose of the 90-day recording provision is to provide notice to the world of interests in real property as evidenced by MCL 565.25(4). Under the decision of the

Court of Appeals, lien rights will be a function of whether a lien claimant may be said to have substantially complied with the 90-day recording provision. In that regard, there are three temporal variables each of which may combine in different ways to affect the determination of substantial compliance. All of the variables relate to the 90th day after the last day of furnishing materials or labor. They are as follows: the date the lien is **presented** for recording (how many days before or after the last day of furnishing); the date the lien is **accepted** for recording (*id*); and the date the lien gets **recorded** (*id*).

In *Northern Concrete Pipe, supra,* the lien was presented for acceptance two different times before it was accepted (*Id.* at 318). Both times were within the 90 days of last furnishing. In the instant matters, Central's liens were presented approximately 16 days before the 90-day deadline for recording, but were not recorded until approximately 30 days later. KSI's lien was presented approximately 15 days before the deadline for recording , but was not recorded until approximately 19 days after the deadline. Cappy's liens were presented for acceptance approximately 13 days prior to the recording deadline, but were not recorded until approximately 36 days after the deadline. Avoidance of this kind of sliding scale approach to the notice provisions of Michigan's real property law was precisely what the Court had in mind when it stated, "[a] precise deadline is not well suited to an analysis of what constitutes substantial compliance" (*Northern Concrete Pipe*, *supra*, at 323) and is one of the best reasons why a substantial compliance test for recording interests in real property should not be used.

Until now, anyone reading MCL 570.1111(1) was assured that if no lien was recorded within 90 days of last furnishing materials, no lien right existed, which might take priority over the interests of third parties such as bona fide purchasers and lenders who rely upon the records of the register of deeds in determining respective interests held on a property. A substantial compliance test creates the potential of uncertainty in land titles. For example, the liens in this

case were not recorded until approximately 30 to 40 days after they were filed with the register of deeds. Thus, if the Court of Appeals' decision stands, transactions with respect to a property will be fraught with greater uncertainty than contemplated by the statutory language.

Additionally, to allow a substantial compliance test would be unjust to property owners in lien foreclosure actions where recovery from the Fund is not available. While the purpose of the Fund is to protect homeowners from having to pay twice for an improvement by having the Fund pay a subcontractor, supplier or laborer who was not paid by a contractor[2], the Fund is only a party when the property is considered a residential structure. If the property is not considered a residential structure as defined in the Act (e.g., a house built upon speculation or a commercial structure), a lien claimant will not be able to assert a claim against the Fund. As a result, owners will be faced with the expense of defending lien foreclosure actions, where they relied on the records of the register of deeds showing no liens on their property within the 90-day time period.

All of which is to say that there are interests other than those of the lien claimants to which this Court in *Northern Concrete Pipe* gave great weight as to why the right to a construction lien "ceases to exist" if not recorded within 90 days. Those interests have to do with the paramount importance of relating notice to others who have or may have an interest in a particular property. The Legislature did not impose a 90-day recording requirement simply to force the lien claimant to jump through a procedural hoop. Rather, it serves the important purpose of notifying third parties who are strangers to a transaction between an owner and a lien claimant. As is the case with any specific limit set by statute, strict application of the limit may at times seem harsh or even unjust. But the remedy for such a result lies with the Legislature not the courts – especially where another result would throw the entire Legislative scheme with respect to interests in real property into chaos by application of a sliding scale in which

substantial compliance would depend on the combination of factors (as well as perhaps others) articulated above.

In addition to the uncertainty, applying a substantial compliance construction to the word "record" would work a potentially equal if not greater injustice on innocent homeowners or any other party obtaining an interest in land because of the absence of the benefit of accurate property records. Between innocent third parties without the 90-day notice and lien claimants, lien claimants are better situated to ensure timely recording since they are the ones presenting the lien to the register of deeds. For example, unlike an innocent third party, lien claimants can check on lag time at a register of deeds office and file their liens sooner if necessary to ensure recording within the 90 days from last furnishing; they can mark their calendars to follow-up on whether their liens have been recorded; or they can view the books at the register of deeds for recording.

Finally, a substantial compliance test would affect other provisions in the Act, which contain the word "record" as well. That is to say, insofar as the decision of the Court of Appeals held that the mere filing of the lien satisfies the recording requirement, does that mean throughout the Act the word "record" means "filed" (e.g., statute of limitations provided for in MCL 570.1117(1); notice of furnishing provided for in MCL 570.1109(4); and priority among recorded interests as provided for in MCL 570.1119? What is to prevent a substantial compliance test in reference to other clear and unambiguous provisions of the Act such as MCL 570.1117(1), which provides that a lien foreclosure action "shall not be brought later than 1 year after the date the claim of lien is *recorded,* and MCL 570.1117(2), which provides that upon bringing a lien foreclosure action, "plaintiff shall record a notice of lis pendens ... in the office of the register of deeds?" Furthermore, where the word "record" appears in the Act does it mean

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[2] *Abode v Webster*, 185 Mich App 655, 659; 462 NW2d 806 (1990)

the date the lien was filed and accepted or the date the lien was recorded (i.e., assigned a liber and a page number)? If a substantial compliance test is to be applied to otherwise unambiguous language in part 1 of the Construction Lien Act, it is inevitable that questions will arise as to whether the file date, the acceptance date, or the record date applies when they are not the same date. This is especially true when it concerns bringing a foreclosure action or when issues of priority arise between mortgage lenders and lien claimants as provided for in MCL 570.1119(4). Thus, a substantial compliance test creates confusion for lien claimants, owners, third parties, attorneys, and the legal system.

D. **The decision of the Court of Appeals is contrary to the decision of this Court in *Northern Concrete Pipe, Inc. v Sinacola-Midwest, Inc.*, 461 Mich 316; 603 NW 2d 257 (1999).**

This Court has held that the substantial compliance provision of the Act provided for in MCL 570.1302(1) does not apply to the clear and unambiguous language contained in MCL 570.1111(1).

> As an exception, this provision [substantial compliance] should not be interpreted to nullify altogether the general rule that statutes should be interpreted with their plain and unambiguous meaning. *Northern Concrete Pipe, supra*, at 321.
>
> ***
>
> The case before us is a clear instance in which the **Legislature could not have imposed a more precise requirement. MCL 570.1111(1)...states without qualification that a subcontractor's right to a lien ceases to exist if not recorded** in the county office of the register of deeds within ninety days after the last furnishing of labor or material.
> [*Id.* at 323, 324. (Emphasis added).]

The Court of Appeals correctly observed that the "substantial compliance provision does not necessarily apply to all requirements of the act." (App 38a.) The decision of the Court of Appeals, however, completely misconstrued *Northern Concrete Pipe* in finding that substantial compliance applies to those provisions that require the filing of information:

> In applying these factors[3], the Court in *Northern Concrete Pipe* observed that provisions outlining the requirements for filing certain information with public officials or **those providing for notice** are the types of provisions **to which a substantial compliance provision may suitably be applied**.
> [App 38a. (Emphasis added).]

This Court in *Northern Concrete Pipe* made no such observations with respect to MCL 570.1111(1). But even if it had, it is clear that this Court did not find that substantial compliance applies to the express provisions of the Act.

> So, while we acknowledge that the "substantial compliance" provision is applicable to part one of the act, we do not believe that this should be interpreted so broadly as to authorize the Court to dispense with the Legislature's explicit mandates. Even the relatively broad language in *Vugterveen Systems* was tempered by the Court's acknowledgement that "the act's clear and unambiguous requirements should not be ignored."
> [*Northern Concrete Pipe*, at 321, n 15, citing *Vugterveen Systems, supra,* 454 Mich at 121, citing *Brown Plumbing, supra,* 442 Mich at 185. (Quotation marks in original).]

In view of the foregoing, this Court adopted a strict-compliance rule with respect to MCL 570.1111(1). The salient facts presented in *Northern Concrete Pipe, supra*, differ from the facts of the present case only with respect to the number of times the liens were presented for acceptance. Unlike the instant matter, the lien in *Northern Concrete Pipe* was not accepted for filing until the third presentment. That distinction, however, does not justify a different outcome

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[3] In *Northern Concrete Pipe*, *supra*, at 321, 322, this Court noted that the scope of the substantial compliance provision requires a case-by-case analysis of "the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a "substantial compliance" clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes "substantial compliance" within a particular context; and, ...the specific language of the "substantial compliance" and other provisions of the statute." While the Court of Appeals applied the above factors to the instant matter, it chose to ignore the plain language set forth in the 90-day recording provision, MCL 570.1111(1) as well as the interests of innocent third parties (e.g., bona fide purchasers).

since the plain and unambiguous language of MCL 570.1111(1) remains the same. Thus, the Court of Appeals' application of the substantial compliance language to the very section [111(1)] to which this Court in *Northern Concrete Pipe* has held it is inapplicable, is contrary to the decision of this Court.

CONCLUSION AND RELIEF SOUGHT

Regardless of whether the failure to record Central's, KSI's, and Cappy's liens within the 90-day period is entirely their fault, it is not a sufficient reason to amend the statute. There are other interests at stake beyond those of these claimants. If the Legislature intended for the filing and acceptance to be the mechanism by which lien rights are secured, then the Legislature, not a court, should rewrite MCL 570.1111(1) to say so. The Court of Appeals failed to follow the plain meaning rule of statutory construction and, as a result, made a ruling, which is irreconcilable with this Court's decision in *Northern Concrete Pipe*. Thus, Appellant requests that this Court reverse the decision of the Court of Appeals and find that the lien claimants' right to a construction lien "cease[d] to exist" when their claims were not *recorded* within 90 days of their last date of furnishing as required by MCL 570.1111(1).

Respectfully submitted,

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